

July 27, 2022

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

SHERROD, TEED, VANDERHAGEN and WARE,

Plaintiffs,

-v-

Case No. 17-10164

VNA and LAN,

Defendants.

/

JURY TRIAL

BEFORE THE HONORABLE JUDITH E. LEVY  
UNITED STATES DISTRICT JUDGE

JULY 27, 2022

APPEARANCES:

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*(Appearances Continued on Next Page)*

TO OBTAIN A  
CERTIFIED  
TRANSCRIPT:

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**FEDERAL OFFICIAL COURT REPORTER**  
**UNITED STATES DISTRICT COURT**  
**200 EAST LIBERTY STREET**  
**ANN ARBOR, MICHIGAN 48104**

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**I N D E X**WITNESSESPAGE

(None)

EXHIBITSMarkedAdmitted

(None)

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P R O C E E D I N G S

THE CLERK: Calling Sherrod, Teed, Vanderhagen, and Ware vs VNA and LAN.

MR. STERN: Good morning, Judge. It's nice to see everybody.

Corey Stern and Moshe Maimon on behalf of the plaintiffs.

THE COURT: Thank you.

MR. STEIN: Good morning.

Daniel Stein and Mark Ter Molen for VNA.

MR. KENT: David Kent and Phil Erickson for LAN.

THE COURT: Good. Thank you. All right. We will -- okay. Let me -- all right.

So we have a jury question. The jury would like Exhibit 5018.

Does anybody know what that is?

MR. MAIMON: Yes, Your Honor.

That is -- was marked for identification, although not received in evidence. It is the NSPE Code of Ethics.

THE COURT: Oh. That does seem to be what they're focused on.

MR. MAIMON: They love those learned treatises, don't they?

THE COURT: Yes. Okay. So we cannot give them that.

MR. MAIMON: So I think that at this point, this is

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1 -- it's understandable that they're asking for these things.  
2 I think that it would be appropriate to instruct them, again,  
3 that this, like the other -- like the articles can't be -- but  
4 I think that if they want testimony, certain testimony about  
5 them, that that's something that they could hear.

6 If there's a particular aspect of it that there was  
7 subject to testimony, they could have that.

8 The Lead and Copper Rule is the same thing.

9 THE COURT: Exactly.

10 MR. MAIMON: And obviously, Engineering Code of  
11 Ethics. There were two that were marked for identification  
12 but neither of which went into evidence.

13 The MDEQ report, August the 2015, we've identified  
14 two documents that possibly and alternatively might qualify.  
15 One is Plaintiff's Exhibit 692, which is the August 20, 2015,  
16 Lead and Copper Rule result report. It's on MDEQ stationary.  
17 It was filled out by Michael Glasgow.

18 THE COURT: Right.

19 MR. MAIMON: But that would fit within what they've  
20 asked for.

21 In addition, VNA Exhibit 1963 was the letter from the  
22 MDEQ to -- I think it's Mr. Wright at the city instructing  
23 them to put in a phosphate control by January of 2016.

24 THE COURT: Okay. Why don't we give them -- do you  
25 agree, Mr. Stein?

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1 MR. STEIN: Yes, we agree.

2 THE COURT: That those two exhibits would be  
3 responsive?

4 MR. KENT: We agree.

5 MR. MAIMON: We're fine sending both in, Your Honor.

6 THE COURT: Okay. I was asking Mr. Stein if he  
7 agrees.

8 MR. STEIN: Oh, yes.

9 THE COURT: And Mr. Kent?

10 MR. KENT: I thought you were looking at me when I  
11 said it. So, yes, we agree.

12 THE COURT: Oh, okay. I'm looking at everybody.

13 MR. MAIMON: If we do send both in, Your Honor, I  
14 also think that it would be appropriate to tell the jury, you  
15 know, "Here are two documents that we've identified that could  
16 be responsive" --

17 THE COURT: Right.

18 MR. MAIMON: -- "we've given you both. If we've got  
19 it wrong, let us know."

20 THE COURT: Let us know.

21 Then with respect to the first three items, which are  
22 not in evidence, not admitted as evidence, I can -- you know,  
23 what I've been doing is knocking on the door, waiting until I  
24 hear them say, "Come in." Then I walk in and say, "Here are  
25 the exhibits that we think are responsive."

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1           And I've said -- I've mentioned that certain things  
2           are not admitted as evidence. I just say that to them. I'd  
3           be happy to say that to them on the first three items and then  
4           follow up and just say, "If there's something else such as" --  
5           I hate to sort of suggest that they should be asking for  
6           testimony, but I don't know what else --

7           MR. MAIMON: I don't think it's a suggestion. I  
8           think it's --

9           THE COURT: Is the Lead and Copper Rule part of an  
10          exhibit anywhere?

11          MR. MAIMON: No. And it's probably too long to be  
12          part of an exhibit.

13          THE COURT: Right. That's right. Well, nothing  
14          seems too long the way we've gone through paper here.

15          MR. KENT: Your Honor, I would be hesitant to  
16          suggest, even raise if you want some testimony, because  
17          determining how many witnesses and which ones discussed which  
18          things, that could really take some time. Because it was  
19          broached with multiple witnesses in different ways.

20          So I think you're opening a genie's bottle to the  
21          extent you suggest, "Oh, if you want some testimony, let us  
22          know."

23          THE COURT: Okay.

24          MR. KENT: I'd wait for them to make the request.

25          THE COURT: Yeah. I think that's right. I will just

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1 say, "If there's anything else that you think might be  
2 helpful, let us know." I'll just say, "anything else."

3 MR. MAIMON: And then I would tell them that we've  
4 identified two documents that --

5 THE COURT: Oh, yeah. I'll do that.

6 MR. MAIMON: Let us know if --

7 THE COURT: If you need something else --

8 MR. MAIMON: Or if we got it wrong.

9 THE COURT: Yeah. I will definitely do that.

10 MR. STERN: Are you going to carry transcripts with  
11 you when you tell them "anything else," or is it just going to  
12 be --

13 THE COURT: "If you need anything else."

14 Okay. And I do want you to know that they put in  
15 their lunch order. So they're planning to work through lunch.

16 MR. STERN: Where are we eating?

17 THE COURT: We're eating always when they're open at  
18 Afternoon Delight. So this is good. All right.

19 MR. STERN: Thank you.

20 THE COURT: Why don't you stay here, and I'll come  
21 back and let you know if they have any question or anything  
22 like that.

23 THE CLERK: All rise.

24 (Pause In Proceedings)

25 THE COURT: Leslie -- we have another question. Oh.



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1 Do you want to get Mr. Stern and Ms. Daly?

2 Okay. Our jury is working hard. They're very --  
3 everybody is engaged around the table. There's no one off to  
4 the side. Everyone's engaged. And when I told them that  
5 these were not actually exhibits, they accepted that.

6 They said, "Okay. Then we might as well ask you  
7 this: Are the expert reports exhibits?" Because they were  
8 pretty sure they were not. And I told them they are not.

9 One juror said -- I said and the Lead and Copper Rule  
10 is many, many, many pages long. And she said, "We would take  
11 ten at a time." So they really are digging into this.

12 But then they -- a couple of jurors spoke right up  
13 and said that they would like -- this is not -- every juror  
14 doesn't have this question.

15 But they seem to have a dispute over what the word  
16 "implementation" means on page 23, paragraph 5 of the jury  
17 instructions. Oh, right. They want to know what the  
18 "immediate implementation of orthophosphate corrosion  
19 inhibitors," what does the word "implementation" mean there.

20 So I am going to -- this is plaintiffs' allegation.  
21 So I'll start with asking -- but let me open a document to  
22 write the answer. I mean, I think if I try to understand "the  
23 immediate implementation of," does that mean failure to --

24 MR. STEIN: Your Honor, I think we go down a  
25 dangerous path when we start trying to parse these words.

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1 THE COURT: I think we do.

2 MR. STEIN: My suggestion would be that we advise --  
3 we understand their question. But we advise the jury that  
4 it's up to them to decide these issues based on all of the  
5 instructions, including the instructions about, you know, the  
6 one on page 22 about the standard of care.

7 MR. MAIMON: So I disagree, Your Honor. I think that  
8 when a jury asks for clarification about something, the  
9 response from the Court should not be, "Figure it out on your  
10 own."

11 THE COURT: Unless it has to be figure it out on your  
12 own.

13 MR. MAIMON: Unless it has to be. But if it's words  
14 that were chosen in a jury instruction, I think it's perfectly  
15 appropriate. I just opened up the first online dictionary  
16 that I had, and it defines "implementation" as, "a noun, the  
17 process of putting a decision or plan into effect."

18 THE COURT: What about "put in place"? I think the  
19 immediate --

20 MR. STEIN: I mean, if we were to say  
21 "implementation" means putting a plan into effect.

22 Is that the language?

23 MR. STERN: It's the process or putting a decision  
24 or --

25 MR. MAIMON: Or plan into effect.

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1 MR. STEIN: I think if we were to say that's what the  
2 word "implementation" means. But, again, we remind you to  
3 consider all of the Court's instructions in analyzing this  
4 issue.

5 MR. MAIMON: That's fine.

6 THE COURT: Okay. That sounds good. I am  
7 sympathetic to both what Mr. Stein and Mr. Maimon said in the  
8 sense that if we just start giving them dictionary definitions  
9 of words, I don't know how much that's going to help them.

10 But I did just say, "We can't give you those three  
11 exhibits. We can't give you the expert reports. We will  
12 answer your questions if you give us questions or have other  
13 ways that you'd like to learn more about what was in those  
14 exhibits."

15 I obviously didn't say anything about transcripts.

16 Okay. "Thank you for your question regarding the  
17 meaning of 'implementation' in the jury instruction on  
18 page 23, paragraph 5."

19 Okay. Now, will you dictate to me --  
20 "implementation" means.

21 MR. STERN: The process of putting a decision or plan  
22 into effect.

23 THE COURT: Do you agree, Mr. Stein?

24 MR. STEIN: Yes.

25 MR. MAIMON: Can we get an electronic version of

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1 this?

2 THE COURT: Yes.

3 So, Leslie, I will give this to you by email to  
4 print. And then if you'll email the scanned after this. And  
5 then I'll sign it and give it back to them.

6 And they like the lunches a lot. Okay. So we'll  
7 just go off the record.

8 (Off The Record)

9 MR. STEIN: Your Honor, I would ask that we also add  
10 one sentence that says, "I remind you to consider all of the  
11 Court's instructions in analyzing this issue."

12 THE COURT: So I have, "Please remember to use all of  
13 the Court's instructions in considering this issue."

14 That's a good catch.

15 MR. MAIMON: So I think that in the general  
16 introduction, which is page 2 of the instructions, I would  
17 simply use the language that the Court had used in the  
18 instruction. And say, "I would remind you do not single out  
19 one instruction, but consider the instructions as a whole."

20 THE COURT: How about, "Please remember to use all of  
21 the Court's instructions in considering this issue and do not  
22 single" --

23 MR. MAIMON: My problem is telling them what to  
24 consider --

25 THE COURT: Oh.

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1 MR. MAIMON: -- for this issue.

2 THE COURT: I see.

3 MR. MAIMON: If you're simply reminding them of a  
4 general instruction, "I would remind you, do not single out  
5 one instruction, but consider the instructions as a whole."  
6 As opposed to telling them what they must consider on a  
7 certain issue.

8 MR. STEIN: That's fine.

9 THE COURT: Is that okay?

10 MR. STEIN: Yes.

11 THE COURT: Where is that? It's on general  
12 introduction where?

13 MR. MAIMON: Yes. It is --

14 THE COURT: Oh. "Do not single out one instruction,  
15 but consider the instructions as a whole."

16 So, "Please remember not to single out one  
17 instruction, but consider the instructions as a whole."

18 MR. MAIMON: I would -- and I would phrase it the way  
19 Mr. Stein did. "I would remind you," or, "as a reminder."

20 THE COURT: I just say, "please remember."

21 MR. MAIMON: Oh, that's fine.

22 THE COURT: Okay. All right. I'm going to send that  
23 to Leslie. Okay. We will scan this -- just because I signed  
24 it, we might as well have that one.

25 It must be affirming for the jurors that if it took

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1       them one minute to write this question that it took us this  
2       long to answer it. At least they must be affirmed that this  
3       isn't all that easy, so.

4               MR. KENT: Judge, are we still on the record at this  
5       point?

6               THE COURT: Oh, we can be off the record.

7                               (Off The Record)

8                               (Proceedings Concluded)

9                               -               -               -

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11                               CERTIFICATE OF OFFICIAL COURT REPORTER

12               I, Jeseca C. Eddington, Federal Official Court  
13       Reporter, do hereby certify the foregoing 14 pages are a true  
14       and correct transcript of the above entitled proceedings.

15       /s/ JESECA C. EDDINGTON  
16       Jeseca C. Eddington, RDR, RMR, CRR, FCRR

07/27/2022  
Date

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